

## CRAVATH, SWAINE & MOORE LLP

WORLDWIDE PLAZA  
825 EIGHTH AVENUE  
NEW YORK, NY 10019-7475

TELEPHONE: (212) 474-1000  
FACSIMILE: (212) 474-3700

CITYPOINT  
ONE ROPEMAKER STREET  
LONDON EC2Y 9HR  
TELEPHONE: 44-20-7453-1000  
FACSIMILE: 44-20-7860-1150

WRITER'S DIRECT DIAL NUMBER

(212) 474-1059

ALLEN FINKELSON  
STUART W. GOLD  
JOHN W. WHITE  
JOHN E. BEERBOWER  
EVAN R. CHESLER  
MICHAEL L. SCHLER  
RICHARD LEVIN  
KRIS F. HEINZELMAN  
B. ROBBINS KIESSLING  
ROGER D. TURNER  
PHILIP A. GELSTON  
RORY O. MILLSON  
RICHARD W. CLARY  
WILLIAM P. ROGERS, JR.  
JAMES D. COOPER  
STEPHEN L. GORDON  
DANIEL L. MOSLEY  
PETER S. WILSON  
JAMES C. VARDELL, III  
ROBERT H. BARON  
KEVIN J. GREHAN  
STEPHEN S. MAOSEN  
C. ALLEN PARKER

MARC S. ROSENBERG  
SUSAN WEBSTER  
DAVID MERCADO  
ROWAN D. WILSON  
PETER T. BARBUR  
SANDRA C. GOLDSTEIN  
THOMAS G. RAFFERTY  
MICHAEL S. GOLDMAN  
RICHARD HALL  
JULIE A. NORTH  
ANDREW W. NEEDHAM  
STEPHEN L. BURNS  
KEITH R. HUMMEL  
DANIEL SLIFKIN  
JEFFREY A. SMITH  
ROBERT I. TOWNSEND, III  
WILLIAM J. WHELAN, III  
SCOTT A. BARSHAY  
PHILIP J. BOECKMAN  
ROGER G. BROOKS  
WILLIAM V. FOGG  
FAIZA J. SAEED  
RICHARD J. STARK

THOMAS E. DUNN  
MARK I. GREENE  
SARKIS JEBEJIAN  
DAVID R. MARRIOTT  
MICHAEL A. PASKIN  
ANDREW J. PITTS  
MICHAEL T. REYNOLDS  
ANTONY L. RYAN  
GEORGE E. ZOBITZ  
GEORGE A. STEPHANAKIS  
DARIN P. MCATEE  
GARY A. BORNSTEIN  
TIMOTHY G. CAMERON  
KARIN A. DEMASI  
LIZABETHANN R. EISEN  
DAVID S. FINKELSTEIN  
DAVID GREENWALD  
RACHEL G. SKAISTIS  
PAUL H. ZUMBRO  
JOEL F. HEROLD  
ERIC W. HILFERS  
GEORGE F. SCHOEN  
ERIK R. TAVZEL

CRAIG F. ARCELLA  
TEENA-ANN V. SANKOORIKAL  
ANDREW R. THOMPSON  
DAMIEN R. ZOUBEK  
LAUREN ANGELILLI  
TATIANA LAPUSHCHIK  
ERIC L. SCHIELE  
ALYSSA K. CAPLES  
JENNIFER S. CONWAY  
MINH VAN NGO  
KEVIN J. ORSINI

SPECIAL COUNSEL  
SAMUEL C. BUTLER  
GEORGE J. GILLESPIE, III

OF COUNSEL  
PAUL C. SAUNDERS

April 4, 2011

In re Merck & Co., Inc., Securities, Derivative & "ERISA" Litigation (MDL 1658)  
Nos. 05-CV-01151-SRC-MAS & 05-CV-02367-SRC-MAS  
The Consolidated Securities Action

Dear Judge Chesler:

We respectfully submit this letter on behalf of all Defendants<sup>1</sup> in response to Plaintiffs' letter, dated March 31, 2011, regarding the Third Circuit's recent decision in *In re DVI, Inc. Securities Litigation*, Nos. 08-8033, 08-8045, 2011 WL 1125926 (3d Cir. Mar. 29, 2011). The decision in *DVI* does not undermine, or even affect, the legal bases for dismissal of this action presented in Defendants' pending motion to dismiss.

Like their October 5, 2010 letter regarding *Schleicher v. Wendt*, 618 F.3d 679 (7th Cir. 2010), Plaintiffs' March 31, 2011 letter seeks to bring to this Court's attention another decision, this one from this Circuit, that addresses the relationship between loss causation and reliance *at the class certification stage*. In *DVI*, the Third Circuit held that, in the context of class certification, plaintiffs do not have to prove loss causation to invoke the presumption of reliance, but defendants may offer evidence to rebut that presumption. 2011 WL 1125926, at \*7-8. In so doing, the Third Circuit aligned itself with the Second Circuit, which adopted a middle approach between the Seventh Circuit's decision in *Schleicher*, which provided no opportunity for defendants to rebut the presumption at the class certification stage, and the Fifth Circuit's decision in *Oscar*

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<sup>1</sup> Defendant Dr. Edward M. Scolnick, who is separately represented and filed his own motion to dismiss, joins in this letter.

*Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007), which held that loss causation must be proven at the class certification stage.<sup>2</sup>

That class certification issue, however, has no bearing whatsoever on Defendants' pending motion to dismiss. *First*, as set forth in Defendants' motion, the failure to plead loss causation adequately is a proper basis to dismiss a complaint brought under Section 10(b). *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (holding that a complaint should be dismissed on loss causation grounds when plaintiffs fail to plead a specific "causal connection between the material misrepresentation and the loss") (Mem. 25-26).<sup>3</sup> Here, the Complaint should be dismissed because Plaintiffs have failed to plead any plausible allegations that their losses were caused by the revelation that Defendants did not "actually believe" the naproxen hypothesis. For example, Plaintiffs do not (and cannot) allege that the losses incurred in October 2003 and September 2004 were caused by the purported revelation of Defendants' *falsely held beliefs* because those dates do not correspond with *any* revelation about Defendants' beliefs. (*See* Mem. 25-30; Reply 8-19.) Nor do Plaintiffs adequately plead loss causation with respect to the alleged losses on November 1, 2004, because no investor could reasonably have believed that Vioxx retained *any* meaningful commercial viability after it was withdrawn from the market on September 30, 2004. (*See* Mem. 29-30; Reply 16-19.) Thus, Plaintiffs have not pleaded that their losses were caused by Defendants' allegedly falsely-held beliefs in the naproxen hypothesis.

*Second*, as *DVI* confirms, the Third Circuit continues to adhere to the presumption set forth in *Basic Inc. v. Levinson*, 485 U.S. 224, 241-47 (1988), that a stock price in an efficient market reflects all publicly available information. *See DVI*, 2011 WL 1125926, at \*3-4. Therefore, Defendants' argument, relying on *Basic*, that the alleged losses could not have been caused by the disclosure of information that was already known

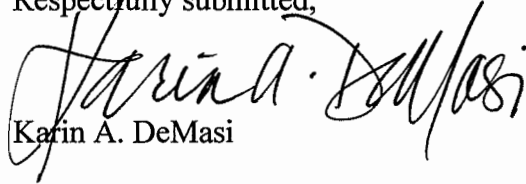
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<sup>2</sup> In light of this growing circuit split, the Supreme Court has recently granted *certiorari* on this class certification issue in another Fifth Circuit case following *Oscar*. *See Archdiocese of Milwaukee Supporting Fund v. Halliburton Co.*, 597 F.3d 330, 335 (5th Cir. 2010), *cert. granted sub nom. Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 856 (2011).

<sup>3</sup> Citations to "Mem." and "Reply" refer to the Memorandum of Law in Support of Defendants' Motion To Dismiss the Corrected Consolidated Fifth Amended Class Action Complaint (ECF No. 254 Attach. 1) and the Reply Memorandum of Law in Support of Defendants' Motion To Dismiss the Corrected Consolidated Fifth Amended Class Action Complaint (ECF No. 264), respectively.

to and incorporated into an efficient market remains an additional, independent ground on which to dismiss Plaintiffs' complaint. (*See* Mem. 25-30; Reply 8-19.)

Respectfully submitted,

  
Karin A. DeMasi

Honorable Stanley R. Chesler, U.S.D.J.  
United States District Court for the District of New Jersey  
Martin Luther King, Jr. Federal Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

VIA ECF

Copies to:

David A.P. Brower, Esq.  
Brower Piven  
488 Madison Avenue, 8th Floor  
New York, NY 10022

Salvatore J. Graziano, Esq.  
Bernstein Litowitz Berger & Grossmann LLP  
1285 Avenue of the Americas  
New York, NY 10019

Mark Levine, Esq.  
Stull, Stull & Brody  
6 East 45th Street, 5th Floor  
New York, NY 10017

Richard H. Weiss, Esq.  
Milberg LLP  
One Pennsylvania Plaza  
New York, NY 10119

Paul B. Brickfield, Esq.  
Brickfield & Donahue  
70 Grand Avenue  
River Edge, NJ 07661

James E. Cecchi, Esq.  
Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein  
5 Becker Farm Road  
Roseland, NJ 07068

Alfred C. Decotiis, Esq.  
Decotiis, Fitzpatrick, Cole & Wisler LLP  
Glenpointe Centre West  
500 Frank W. Burr Boulevard  
Teaneck, NY 07666

William R. Stein, Esq.  
Eric S. Parnes, Esq.  
Hughes Hubbard & Reed LLP  
1775 I Street, N.W.  
Washington, D.C. 20006

Martin L. Perschetz, Esq.  
Sung-Hee Suh, Esq.  
William H. Gussman, Jr., Esq.  
Schulte Roth & Zabel LLP  
919 Third Avenue  
New York, NY 10022

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